2703

No. 13027

In the

United States Court of Appeals

For the Ninth Circuit

CATHERINE HEIN, *Appellant,*

— VS. —

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*

APPEAL FROM JUDGMENT OF THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

JAMES TYNAN,
Attorney for Appellant.

409 Colby Building, Everett, Washington.

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INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

CONSTITUTIONS

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OPINIONS BELOW

The opinion of the district judge is in form of a letter and is set out in the record (R. 512-517). The Findings of Fact and Conclusions of Law are at R. 529. The remarks of the trial judge in the state criminal trial are set out at R. 322-330. The opinion of the Washington Supreme Court in the appeal of the criminal conviction is reported in *State v. Hein*, 32 Wn.2d 315, 201 P.2d 691. The opinion of the state court judge in the habeas corpus hearing is set out in the record (R. 490-503). The opinion of the supreme court affirming the order dismissing the writ is reported in *In re Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403. The denial of certiorari by the Supreme Court is reported in 340 U.S. 837.

JURISDICTION

The judgment denying the petition for habeas corpus was entered April 18, 1951 (R. 538). Notice of appeal was filed May 10, 1951 (R. 550). A certificate of probable cause was signed and filed May 10, 1951 (R. 548), and an order granting leave to appeal in forma pauperis was entered May 10, 1951 (R. 548).

Jurisdiction of the district court is based upon U.S. C.A., Sections 2241-2243. This appeal is taken pursuant to the certificate of probable cause under authority of U.S.C.A., Section 2253.

QUESTIONS PRESENTED

Whether the conviction in a state court of a 14-year old boy for murder should be allowed to stand, when the conviction is based entirely upon confession evidence, and

(1) The written confession is denied by the defendant and the state has never proved it to be a confession;

(2) The instrument, a private paper having no connection with the crime, was forcibly taken from him and read to the jury over his objection;

(3) There is no corroboration of the supposed confession in the way of substantive, tangible evidence to connect him with the crime;

(4) He was denied a fair trial because . . .

(a) A police officer was permitted to testify to poorly heard statements made to the officer while in custody;

(b) The prosecutor's stenographer was permitted to testify that denials of guilt made in her presence were not convincing;

(c) It was insinuated that the boy was a dangerous character who might be expected to commit crime; and

(d) The trial was in other respects unfair.

STATEMENT OF THE CASE

This is an appeal from a judgment of the district court for the Eastern District of Washington dismissing a petition for a writ of habeas corpus. The petitioner is the mother of a prisoner held in state custody in the penitentiary pursuant to a judgment of conviction of first-degree murder in the Superior Court of Snohomish County, Washington, and life sentence based thereon. The prisoner was 14 years of age when convicted, and is now 17. The proceeding was commenced by the filing of a petition and an order to show cause issued by the district judge (R. 1-11). The state appeared by the Attorney General and filed an answer (R. 12).

The petition alleges that rights arising under the Constitution of the United States were violated, particularly with respect to the seizure and use of confession evidence. The answer is a general denial and an affirmative defense of res judicata arising from certain proceedings in the state courts.

Records were preserved of all proceedings in the state courts and these were admitted in evidence by stipulation (R. 36-37). From these the following facts appear:

In March, 1948, Richard Hein was tried and convicted of murder in the first degree in the Superior Court of Snohomish County, Washington. The principal item of evidence was a "confession" in his own handwriting (R. 206). All that we know about this instrument came from the defendant himself. It was written by the boy, who was a pupil in junior high

school, in school, on Wednesday, the day after the discovery of the murder (R. 264). The evening before he learned from the neighbors (R. 253) the facts concerning the crime. From this and newspaper accounts (R. 256), he was able to give a first-person narrative of the events which appeared to be an actual confession.

Richard was 14 years of age when he was tried (R. 862). He lived with his mother and step-father in Hartford, Washington. There were two other children in the family, a girl, twelve, and a boy, ten (R. 883). He had attended school at Lake Stevens up to the beginning of the term which began in the fall of 1947 (R. 1211). Then, during the ninth grade, he transferred to the North Junior High School in Everett. He was an average student (R. 266).

His school principal described Richard as an imaginative boy, but not vicious. In his words:

> "He was sort of an individual as far as control is concerned. He liked to have notoriety and attention but he never demonstrated any vicious tendencies in school." (R. 1212, 1213)

The murder was discovered Tuesday, November 18, 1947. Two suspects were arrested immediately. One of them, who was held three or four days, later testified for the state (R. 1003-1005). Toward the end of the week Refsnes, a deputy sheriff, learned that some children attending the junior high school had been talking about the murder (R. 1388). On Monday he and another deputy sheriff, Weaver, went to the school and talked to Joe Jensen, a boy 14 years of age. He said that Richard had told him about the murder

but he thought it was only bragging talk (R. 1115); later he told this to the prosecutor (R. 1122). Richard was then picked up for questioning.

Taken to the jail, Richard asked to be allowed to call his folks but was not allowed to do so (R. 143). The prosecuting attorney was there, and in addition, to the two deputy sheriffs who made the arrest, the undersheriff Jackson was present. Phyllis Mootz, the prosecutor's stenographer, took notes which were made a part of the record in the state habeas corpus proceeding (R. 196, 504-509).

Richard was told he did not have to talk, but was not told that what he might say would be used against him (R. 155). The prosecutor conducted the questioning, with Weaver taking a hand toward the end. Jensen was asked to repeat what he had said at the school. This he did, emphasizing again that he thought Richard was talking for the fun of it (R. 505). But when it appeared that Joe was saying that Richard knew about the crime before it was discovered, Richard became angry and threatened Joe (R. 194). Jackson then grabbed Richard by the arm and told him to sit down, and that "if he was a man I would box his ears for him" (R. 162).

While the interview was in progress Jackson remarked that Richard had not been searched (R. 195) and he was told to empty his pockets, and did so (R. 271). He was then taken out of the room while the officers went through his things (R. 272, 375).

Among Richard's possessions was a billfold, and in it was a writing (R. 141), reading as follows:

"Nov. 17, 1947

"I, Dick Hein, better known as Richard Hein, am going to write a confession to the murder of James Moore Residence of Lake Stevens Washington. This is how it happened: I was walking around the neighborhood smoking. When I thought I would go in and find out how Jims wife was getting along at the hospitle at Monroe. We talked for about five minutes. Then I pick up a cane. Smash the light bulb. And start beating Jim. I busted the cane all to hell on his head. then I hit him with a heavy piece of wood. He still grouned with pain so I took up a knife, and cut his throat and took the money he had with him which amounted to $15.80 and got out of there.

Dick or Richard Hein
P.O. Box 99
Hartford, Wash."

This is the document which was admitted as Exhibit "H" in the trial of Hein.

Upon his return to the room the defendant was asked if the writing was his. He admitted its authorship and said he wrote it in study hour in school one day. When the prosecutor charged him with having written it November 17th (the murder was not discovered until the 18th), he said, "Not the seventeenth, I could have dated it back." When the prosecutor suggested he would feel better if he got the story out of his system now, he answered: "I didn't kill him so what the hell have I got to worry about" (R. 508).

He added, in response to the prosecutor's questions, and referring to the conversation with Jensen, "I didn't tell him a damn thing Monday or Tuesday,

either one;" and, "I told him all that I read in the paper" (R. 509).

When Jensen was asked if there was anything else, he said Richard felt pretty proud of it because they had two other guys up there (R. 507). After a few other questions the prosecutor returned to this and asked him how he could have told about it before the murder was discovered when the two suspects had not been arrested yet. Jensen answered, "That's right, I could be mistaken about the date" (R. 508, 1261).

At the conclusion of the interview, which lasted nearly an hour (R. 1366), Richard's mother was called to get the parents to go to the home so that a search could be made (R. 226). No clues were discovered.

The boy was held in jail, but not booked. Later that night the deputy Walker came on duty and, surprised to find the boy there questioned him. This conversation is set out later in this brief (p. 56).

Sometime later a hearing was held before the juvenile court and the boy was bound over for trial (R. 1255). He was not charged until December 6th in the Justice Court; the charge upon which he was convicted was filed in the Superior Court December 18th (R. 1256). He has been in custody since the jail interview.

Prior to the trial the defendant, who was represented by counsel, moved to suppress the evidence taken from him on arrest. Affidavits and counter-affidavits were filed (R. 568 - 580) and the matter

came on for hearing before Judge Bell, who afterwards presided at the trial. After considering the affidavits, the court granted a continuance (R. 1227) to enable the prosecutor to file additional affidavits (R. 581-583). Upon the showing contained in the new affidavits, the court denied the motion to suppress (R. 584, 1228).

Upon the trial of the case, the prosecuting attorney in his opening statement related to the jury the finding of the writing upon the defendant's person, and, over objection, told them its contents (R. 136). Several witnesses testified for the state as to the circumstances of its finding (R. 141, 149, 163). Upon the state's case in chief, and with no other foundation, the confession was offered in evidence (R. 200). Over strong objection on constitutional grounds (R. 200-204), it was admitted and read to the jury (R. 205).

In addition to the writing the prosecutor relied upon the testimony of Joe Jensen, Inez Pitzer, and Ruth De Monbrun, all minor children, schoolmates of the defendant. Inez testified that the defendant told her about the murder, and she thought it was before the news was published in the paper (R. 170). Ruth overheard the conversation but did not know when it occurred and did not look at the paper (R. 174). The third witness, Jensen, the boy who was at the jail interview, answered a leading question of the prosecutor that the defendant told him "around November 17th, 1947" (R. 178) that the defendant killed Moore.

A knife was introduced in evidence (R. 825). This

knife came out of the Moore home, from which several knives were taken by the authorities the night the murder was discovered (R. 1372, 1392). The particular knife was supposed to have been found in a trash pile near the house, by a prisoner searching under the supervision of the sheriff"s deputies (R. 629-630). The prisoner, Walter Johnson, was never called to the stand, and after the Hein trial was over he was taken before the court and received a suspended sentence on a charge of grand larceny (R. 1293-1296). He has since disappeared (R. 1235-1238). It was never shown that the defendant had anything to do with this knife.

In the district court it was shown that the sheriff was at all times in possession of a cleaver taken from the Moore home, but its existence was not brought to light. There was also evidence that it was more likely that the cleaver was the death weapon (R. 85-92). There is no evidence as to finger prints at any point in the case. The prosecutor's brief on appeal in the criminal cause says it was impossible to determine fingerprints on any of the articles. Whether this includes the knife or cleaver does not appear.

There was evidence that the defendant was in possession of an unusual amount of money on the Sunday before the body was discovered. Mary Ann Hendrickson testified that he was in a grocery store where she worked, on Saturday, and that the deceased was in the store at the same time. The deceased made a small purchase (R. 837).

After reading the "confession" to the jury (R. 206)

the state rested. Without making any motion, the defense proceeded to put in its case. The defendant's parents testified to his whereabouts and conduct during the time in question (R. 207-236). The defendant testified to his activities also (R. 240-294). He told how the note came to be written (R. 264). He denied any knowledge of the crime (R. 265). He testified that he did not show the note to anyone, but put it in his pocket and forgot about it (R. 267). He said the conversations with the other children occurred on Wednesday (R. 262). He testified that Oscar Magnuson gave him the money he had on the Sunday before the discovery of the crime (R. 279). On rebuttal Magnuson denied that he gave the boy money (R. 295-310).

No motion for directed verdict was made, and the case was submitted to the jury. No instruction was given the jury touching the confession, nor were they given the option to disregard it if they found it false. It appears one of defense counsel was not present throughout the very final stages of the cause (R. 324). On motion for new trial the judge gave his reasons for not giving an instruction (R. 323). Neither side asked for such instruction, and he was afraid that if he gave the one he had prepared it might draw undue attention to the matter.

The defendant was convicted without the death penalty, it having been stipulated that might be withdrawn from consideration of the jury (R. 1018). He was sentenced to the penitentiary for life, where he now is. The judgment was affirmed by the supreme court, *State v. Hein*, 32 Wn.2d 315, 201 P.2d 691.

Other Proceedings in State Court

These proceedings in the federal court follow an unsuccessful effort in the state court to secure the release of the prisoner, or to obtain a new trial. The proceedings in the state court were by a petition for a writ of habeas corpus (R. 338) under the provisions of the Washington law of 1947 (Sec. 1075, Rem. Rev. Stat.) which permits a post-trial hearing where the petition alleges that rights guaranteed by the Constitution of the United States have been violated. The petition in the state court makes these allegations. Pursuant thereto the state appeared by the Attorney General and filed an Answer (Supp. R. 1) and a hearing was had. The court ruled against petitioner (R. 510). An appeal was taken to the supreme court of the state which affirmed the trial court's judgment. *In re Hein v. Smith*, 35 Wn.2d 688, 215 P.2d 403.

A petition for a writ of certiorari was filed in the Supreme Court of the United States to review the decision of the state court, and was denied. *Hein v. Smith*, No. 40, Misc., October Term 1950, 340 U.S. 837.

In the habeas corpus hearing Jensen testified that he perjured himself in saying that Richard told him about the crime on November 17th. He said that the conversation occurred on Thursday, two days after the discovery of the crime; that it was in the newspapers at the time, and that the defendant had a newspaper containing an account of it with him (R. 365, 448). He swore that he gave false testimony because he was threatened with the reform school or prison

if he did not testify the way the sheriff wanted (R. 390, 391).

While the appeal in the above habeas corpus case was pending the prisoner filed an affidavit for a new trial under the Washington practice referred to in *Hampson v. Smith*, 153 F.2d 417. Judge Bell refused to issue a show-cause order and the matter was taken to the supreme court by petition for mandamus. The court approved the judge's action by denying a writ of mandate. See Wash. Supreme Court, Cause No. 31375, filed as an exhibit here. State remedies have, therefore, been exhausted.

Proceedings in the District Court

After the denial of certiorari by the Supreme Court the petitioner filed the present petition for a writ of habeas corpus in the district court for the Eastern District of Washington, where the penitentiary is (R. 1). An order to show cause was issued (R. 11), and the respondent appeared by the Attorney General of Washington and filed an answer (R. 12). Upon the issues thus made up a hearing was had at Walla Walla, Washington, on December 12, 1950, at which time witnesses were examined, including the prisoner (R. 37-47). He was not cross-examined (R. 48).

The new evidence at this hearing included two tests, a "lie detector" test, administered July 18, 1950, and a "truth serum" test administered September 9, 1950. The technician who administered the first test was not available (R. 75), but a letter from him in which he expressed the opinion the boy could not be guilty (R. 121), was offered and received in evidence

(R. 76). The physician who administered the truth serum or penathol (R. 51) testified, and Don Magnuson, a reporter for the "Seattle Times," who prepared the questions which were asked (R. 102-121) also testified (R. 67-82). The full record of this test was admitted (R. 69; Ex. 1). Webb Sloane, a Washington State patrolman for 14 years (R. 63), was present at the tests and asked a number of questions of the prisoner (R. 119-121). He testified he was satisfied with the answers (R. 64).

Other testimony related to the cleaver which could have been the death weapon. After the judgment of conviction it was discovered that the sheriff had a cleaver which had been taken from the house where the murder was committed (R. 87). In the present proceeding demand was made upon the state that it be produced (R. 16). The state admitted that it was still in the hands of the sheriff (R. 17), who made an affidavit (R. 20) that in his opinion it was not the death weapon. This evidence bears upon the allegations in paragraph XI of the petition (R. 5).

At the conclusion of the hearing the court then took the case under advisement.

On March 22, 1951, a letter was received from the district judge setting forth his views, and the conclusion that the petition should be denied (R. 512-517). Petitioner filed a motion for new trial (R. 539), and proposed findings. The matter came on again before the court sitting in Seattle. The motion for new trial was denied. The court made one change. In his letter he refers to an affidavit of Joe Jensen dated August 4, 1949, in which he said supported his views

(R. 515, line 14). At the hearing he decided that this affidavit should be disregarded (R. 519) and no finding was made concerning it. The proposed findings were refused, and they were not included in the record.

The letter, after referring to the principle that habeas corpus does not involve guilt or innocence and that the only question is whether the constitutional rights of the defendant were violated, states that the confession was *written voluntarily*. Having been taken from the prisoner upon a lawful arrest, it could be used by the state as evidence (R. 513). Considerable space is devoted to this but no mention is made of petitioner's contention that the *surrender* of the document was *compelled*.

The contention that the writing was not a confession at all was answered by saying that the question was wholly for the jury, and that their verdict foreclosed the discussion (R. 514).

The judge further ruled that Joe Jensen did not commit perjury at the trial of Richard Hein (R. 514). He felt that the conclusions of the state court judge should be given great weight because he saw and heard the witnesses. Jensen's affidavit of August 4, 1949, which was subsequently discarded, entered into his reasoning on this phase of the matter (R. 515).

Answering petitioner's contention that the knife introduced in evidence was not the death weapon; that the cleaver which the sheriff took from the house and which he had in his possession during all this time (R. 17) was more likely the weapon; that the

knife was planted, and "found" in order to substantiate the imaginary confession (which refers to a knife), the judge ruled that it was the knife which produced the wounds (R. 515), and that no evidence was suppressed.

The lie detector and truth serum tests were held to be without value on the issues presented by the petition (R. 515).

Bearing in mind the constitutional doctrines involved, the judge was of opinion that the boy had a fair trial. And, because he had been afforded a full hearing in the state court upon the contentions now advanced, he felt it doubtful if he had acted properly in entertaining the petition in the first place. The denial of certiorari was given considerable weight in this connection (R. 517).

With the exception noted as to the affidavit of Jensen, the letter was carried into the findings of fact and conclusions of law (R. 529), and judgment denying the petition (R. 538), entered April 18, 1951.

ASSIGNMENTS OF ERROR

The district judge erred:

1. In giving undue weight to the findings and opinions of state court judges.

2. In allowing his decision against petitioner to be influenced by the fact that the Supreme Court denied certiorari.

3. In holding that the confession was voluntary.

4. In holding that the jury had the right to consider the confession.

5. In assuming there was some tangible evidence to connect the defendant with the crime.

6. In holding that the defendant had a fair trial and that no rights secured to him by the Constitution of the United States were violated.

SUMMARY OF ARGUMENT

I.

The production of the writing, Ex. "H" in the criminal trial, assuming that it is in fact a confession, was compelled; and it cannot, therefore, form the basis of a conviction. While, under the rule of *Wolf v. Colorado*, 338 U.S. 25, the manner of procuring evidence by the state may not be a federal concern, confessions are in a different category and can be made use of only if they are voluntary. The manner of compelling the production of this writing renders it involuntary in the eye of the law. *United States v. Abrams*, 230 Fed. 313. An involuntary confession cannot be used for any purpose. *In re Fried*, 161 F.2d 453. Its surrender under duress, even though no physical pressure was used, and its use at the trial, renders the trial a nullity. *Haley v. Ohio*, 332 U.S. 596.

II.

In determining whether a confession has been made, it is necessary to consider the personality of the alleged confessionalist. Wigmore on Evidence (Revised Ed.) Sec. 866.

Here we have a 14-year old boy, of good reputation, who stands fair in his studies and in whom his school principal saw nothing vicious. He attended school on the day the murder was discovered and on the day

before. He came home the evening of the finding of the body, and from neighborhood gossip learned the details of the crime. Next day he read the morning paper, giving further news of it. In school that day he wrote out an imaginary account of the murder, naming himself as the killer. He testified that it was done for foolishness, and to this day no one has been able to dispute him, nor has there been the slightest thing to connect him in any way with the crime. His whereabouts during all the period were fully accounted for, and nothing in his conduct then or now betokens guilt.

Under these circumstances this instrument should have been rejected as worthless. At first blush, it has a semblance of verity because Joe Jensen said that Richard told him a similar tale before the murder was discovered. But when the discrepancy concerning the arrest of the two suspects was pointed out, he changed his story and said he could be mistaken about the dates.

Jensen said he thought Richard was bragging, was telling him simply for the fun of it. Inez Pitzer, another schoolmate, to whom he had also bragged, asked him why he killed the man; he answered, "Just for the hell of it." She told this to the prosecutor. Surely this was enough to show that that there was no confession in fact.

The state trial judge felt there were grave doubts whether the document was a confession, but he left the matter to the jury without any instruction. They were not even told they might disregard it if they found it false. But the trustworthiness of a confes-

sion, as well as its voluntary character, are questions of law. They are not foreclosed by a jury verdict. *Ashcraft v. Tennessee*, 322 U.S. 143. The district judge committed the same error.

Another basic error is that if the confession is not admissible as such, it is somehow admissible as "having evidentiary value"; in other words, it is circumstantial evidence. But we submit, if it isn't a confession, it isn't anything. In *Bram v. United States*, 168 U.S. 532, it was sought to sustain coerced statements from which guilt could be inferred on the ground that they were not confessions because they were in form at least, denials of guilt. But the court answered that the only hypothesis upon which they were offered was that they tended to prove guilt; since they were shown to be involuntary they were inadmissible as confessions; consequently, they were inadmissible altogether. That is the case here.

Another basic error in reasoning is that because the confession was secured as a result of a search upon a lawful arrest, it is admissible. But a search does not make inadmissible evidence admissible. Articles or papers seized during the course of a search, which it is unlawful for the arrested person to have and which may be used to prove the offense, may be taken and held for use as evidence, *Carroll v. United States*, 267 U.S. 132; but private papers, which are not themselves forfeitable, may not be taken. *United States v. Friedberg*, 233 Fed. 313. The search adds nothing to the value of the confession, and cannot sustain its unlawful use by the state.

Corroboration of a confession is required. There must be some evidence to connect the accused with the crime. This is not furnished by corroboration that he confessed, which is all that appeared here (and the most important evidence of that was later shown to be perjured). As in *Ashcraft v. Tennessee*, 322 U.S. 143, 168, investigation has failed "to unearth a single tangible clue pointing to the guilt of the defendant." There was nothing to show that the boy was in any way connected with the events described in the confession, and if we give credence to his alibi, it was quite impossible for him to have been there. The alibi evidence should be believed, because there is nothing in the record to cast doubt upon it. *United States v. Lee Heun*, 118 Fed. 442.

III.

A state must observe certain standards in the administration of its criminal law. While it is "free to devise its own way of securing essential justice," it cannot, as Mr. Chief Justice Hughes observed in *Brown v. Mississippi*, 297 U.S. 278, substitute trial by ordeal. The things set up and established in this case are not mere matters of evidence, of details in the conduct of an essentially fair trial. They are fundamental wrongs.

The treatment of the written instrument was a failure to observe fundamental fairness. Essentially, the procedure was to shift responsibility to the jury. That was the device the states used to escape responsibility for the brutally coerced confessions which for a time disgraced the records of our crim-

inal trials, particularly where Southern Negroes were involved. But the Supreme Court placed the responsibility for determining the validity of confessions where it has always belonged, upon the judges. *Ashcraft v. Tennessee*, 322 U.S. 143. That duty cannot be evaded by calling the confession circumstantial evidence; by saying that its truth or falsity is for the jury, when there is no evidence to support a hypothesis of truth; or by saying that the jury may have it, for whatever value it may have, because the officers took it from the defendant during a routine search. If it is not a confession,—and even if it is, and it was unlawfully obtained, — it should be excluded. Since that was not done the conviction is fatally tainted by the unlawful evidence.

Even those who argue that the stand taken by the Supreme Court against confessions resulting from police interrogation is too strict, Cf. dissenting opinion in *Ashcraft v. Tennessee*, 322 U.S. 156, concede that a confession is not valid unless the accused has the right "to resist, to admit or deny, or to refuse to answer (322 U.S. 170). *Lisbena v. California*, 314 U.S. 219." No choice rested in the prisoner here.

It will not do to say that it was voluntary because it was composed and written without pressure. It derived its effectiveness from communication; before that it was nothing. It was made use of by first compelling the boy to surrender it up, and then by forcing him to admit that he wrote it. When these things were accomplished it was admitted in evidence at the trial, and we can have no doubt it was the

thing that enabled the jury to bring in the verdict of conviction.

On the same day that the confession was surrendered, a deputy sheriff, Walker, had the boy alone in the jail. He asked him if he committed the murder. At the trial he was permitted to repeat the boy's answer, as he remembered it four months later. He said it sounded like, "Uh-huh, but they'll have to prove it on me." This testimony violates the rule laid down in *Bram v. United States*, 168 U.S. 532, reaffirmed in *Watts v. Indiana*, 338 U.S. 49, that trials in our courts follow the accusatorial, rather than the inquisitorial, system, and that the results of police interrogation may not be shown to establish an inference of guilt. Such procedure was held to be a violation of the Due Process clause of the Fourteenth Amendment in *Ashcraft v. Tennessee*, 322 U.S. 143.

At the trial Phyllis Nootz, the prosecutor"s secretary and stenographer, who was present at the jail interview, was called as a witness to identify the confession and to establish that the boy admitted writing it. Counsel for the defendant, on cross-examination, asked her to admit what the undersheriff Jackson had already said (R. 167), that the boy denied committing the murder. She answered by saying that yes, he denied it, but the denial was not emphatic, and left her with a feeling of doubt as to whether he was telling the truth. This testimony also violates the rule above referred to. Even if we admit that a state may remove the privilege against self-incrimination, this kind of thing could not be sanctioned.

It compels a person to testify against himself by a form of coercion that violates due process. *Adamson v. California*, 332 U.S. 46. For even if the defendant could be compelled to explain his apparent connection with a crime, it is not fair on so vital a matter, to allow the prosecutor to put a fatal construction on his words. The prosecutor here was giving his opinion through his paid employee. The admission of this evidence renders the proceedings so unfair that they should not be allowed to stand.

Successful efforts were made to get the jury to believe they were dealing with a bad boy, a dangerous character who should not be allowed at large. There can be no doubt that this influenced the verdict.

The argument to the jury was not taken down, so it is not preserved in the record. We can infer, however, from the opening statement and the prosecutors' conduct throughout, that it was not charactirized by indulgence toward a boy's foibles. Counsel for the prisoner who took the lead during state's case was not present during the "very final stages of the cause." And because the boy who had committed no murder, wrote a note saying he did—and the unfair tactics mentioned—appellant's son is spending his life in the penitentiary.

ARGUMENT

I.

The conviction is based upon confession evidence, and the confession having been compelled, the conviction is void as contrary to due process of law.

A. *The officers compelled the 14-year-old defendant to surrender up the writing upon which he was convicted.*

When Jackson remarked during the jail interview that Richard had not been searched, Refsnes ordered him to lay his things out on the table (R. 163, 195, 141). According to Richard (R. 272) and Joe Jensen (R. 375), he was then taken out of the room while the officers went through his things. When he was returned the questioning was resumed.

On his trial the defendant testified:

> "Q How come you emptied your pockets?
>
> A They asked me to, and told me to. You might just as well do it. It was just as if they were telling you to * * *. I had a pen and I had some keys, and my wallet, and I can't think of much else * * *. I laid them on the desk * * *. They put me in another room while they went through my stuff." (R. 271)

Richard was loath at first to admit the writing was his, but did not deny it. He did deny, however, that he committed the murder, and denied he told Jensen anything before the discovery of the crime (R. 504-509).

It is quite clear that this was not a voluntary disclosure. The boy had no choice but to hand over his possessions. Nobody had ever seen the writing; its

contents had never been communicated. It was his and his alone. Indeed, he had forgotten that he had it. Yet he was required at the command of the police officers to surrender it up. Such action was not voluntary.

> "It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational and civilized society to hold that a confession is 'voluntary' simply because the confession is the product of a sentient choice. 'Conduct under duress involves a choice' * * *, and conduct deviod of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." *Haley v. Ohio*, 332 U.S. 596, 606, 92 L. ed. 224.

Furthermore, it is a *confession* we are dealing with. A confession, to be admissible, must be voluntary. If it is in any manner coerced or compelled it cannot form the basis of a conviction. *Ashcraft v. Tennessee*, 322 U.S. 143; *Malinski v. New York*, 324 U.S. 401. The boy did not at any time adopt this writing as a true account of something that had happened; on the contrary, he declared it was not true.

Papers taken from an accused under circumstances rendering the disclosures involuntary cannot be used to convict.. In *United States v. Abrams*, 230 Fed. 313, two customs agents entered petitioner's place of business and took private papers away. These papers were afterwards used to show admissions of guilt. The court held their delivery was not voluntary, and the conviction thus obtained was void. The court said:

> "None of the papers were voluntarily delivered

> to the officers. They were all obtained by the promise or threat that it would be better for the defendant if he gave Mr. Chandler what he wanted. This promise or threat influenced the defendant to part with his papers, and makes their delivery involuntary in the eye of the law. * * *. *The delivery of these papers may be likened to a confession, which is incompetent because not voluntarily made. Bram v. United States*, 168 U.S. 532. Do the same reasons and rules apply to obtaining from a defendant papers which contain evidence of crime as would apply in obtaining an oral admission of crime from him? The same reasons and rules should and do apply, and the fact that the evidence thus obtained is written makes no difference. The defendant's constitutional rights are as much violated in the one case as in the other." (Emphasis added)

In *Bram v. United States*, 168 U.S. 532, the court held that disclosures to a police officer while in custody should not have been admitted. It was held contrary to the law of nature that man be made the deluded instrument of his own destruction, and that the use of disclosures made as the result of police pressure violated the Fifth Amendment.

Ashcraft v. Tennessee, 322 U.S. 143, teaches us that a conviction based upon such evidence violates the Fourteenth Amendment. In that case there was no evidence of the participation of either Ashcraft or his co-defendant Ware in the crime, except the statements made while in custody. The court held that the convictions could not stand where there was even a hint of pressure to exact the confessions.

The matter was again before the court in *Watts v. Indiana*, 338 U.S. 49. The court took occasion to reiterate what was said in the *Bram* case: that ours is the accusatorial, as opposed to the inquisitorial, system. The state is bound to produce evidence to convict the prisoner—not out of his own mouth. A man may not be used to destroy himself.

There was no substantive evidence in the case at bar. All we have are the defendant's supposed admissions, and even these were not made with intent to confess. Such disclosures cannot be deemed voluntary. As was said by Mr. Justice Brandies in *Zing Zung Won v. United States*, 266 U.S. 1:

> "In the Federal Courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary, if, and only if, it was, in fact, voluntarily made."

And the rule in Washington is that an act done at the command of a police officer cannot be deemed voluntary. *State v. Miles*, 29 Wn.2d 921, 190 P.2d 740.

B. *The compulsory production of a confession cannot be justified by a showing that there was a lawful arrest.*

The opinion of the district judge on this phase of the case reads as follows:

> "It should be noted that the document in the handwriting of Richard Hein which purported to set forth the manner in which he committed the murder, was written by him of his own accord and was entirely voluntary so that it could not be said that it was, in any sense, a coerced or improperly induced confession. It was taken

from him by state officers and used as evidence in a state court. The federal Fourteenth Amendment, therefore, would not forbid its use as evidence as the fruit of an unreasonable search and seizure. *Wolf v. Colorado*, 338 U.S. 25; *Elwood v. Smith*, 9 Cir. 164 F.2d 449. And the Fourteenth Amendment does not make applicable to the state the provision of the Fifth Amendment that no person shall give evidence against himself in a criminal case. *Adamson v. California*, 332 U.S. 46."

Now the Fourteenth Amendment *does* make applicable to the states the rule that a coerced confession shall not be used to convict. In *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (footnote 9) the court said:

"The question in the *Bram* case was whether Bram had been compelled or coerced by a police officer to make a self-incriminatory statement, contrary to the Fifth Amendment; and the question herein is whether Ashcraft similarly was coerced to make such a statement, contrary to the Fourteenth Amendment. *Lisbena v. California*, 314 U.S. 219, 236-238. Taking together, the *Bram* and *Lisbena* cases hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court."

It must be remembered that this writing was not contraband; it was not the property of the deceased; it belonged to nobody but the author. And it was not an instrumentality of the crime. So, under the ordinary rules governing seizure and use of evidence, it was not proper for the prosecution to make use of it.

"When a man is legally arrested for an offense, whatever is found upon his person, or in his control *which it is unlawful for him to have, and*

> *which may be used to prove the offense,* may be seized and held as evidence in the prosecution." *Carroll v. United States,* 267 U.S. 132 (Italics supplied)
>
> "The government cannot justify the seizure of private papers and memoranda on the ground that they were to be used as evidence in a criminal prosecution, *where the papers themselves were not forfeitable,* and hence not subject to seizure." *United States v. Friedburg,* 233 Fed. 313. (Italics supplied)

The case differs from those where the papers seized are contraband, *State v. Royce,* 38 Wash. 111, 80 Pac. 268; or the instrumentality of the crime, *State v. Lindsey,* 192 Wash. 356, 73 P.2d 738. Articles not used in the commission of the crime are not admissible, even though secured by a lawful search. *State v. Robinson,* 24 Wn.2d 909, 167 P.2d 986.

The question here does not merely involve the privilege against self-incrimination, nor is it answered by *Wolf v. Colorado.* It was convenient for the officers that they did not have to administer any outright physical pressure, but the threat of it was there, as the testimony of Jackson shows. What is involved here is stated by Wigmore:

> "Where a compulsory disclosure is involved, it may be admissible so far as the privilege against self-crimination is concerned, and yet the question of its propriety as a confession may be raised; while it may be inadmissible on both grounds." Wigmore on Evidence (Rev. Ed.) Vol. 3, p. 249, Sec. 823.

Adamson v. California, 332 U.S. 46, does not go

nearly as far as the district judge seemed to feel. For the court there said:

> "The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process." (332 U.S. 54)

Wolf v. Colorado, 338 U.S. 25, relied upon by the district judge, does not authorize testimonial compulsion. Business records only were involved there. The distinction is made in *Brown v. Mississippi*, 297 U.S. 278: That while a state may, consistent with due process, require an accused to take the stand, it is a different matter if his out-of-court statements are used against him. Such statements may be used only if they are voluntary disclosures.

C. *Although the instrument was composed and written voluntarily, it cannot be deemed a voluntary disclosure when its delivery was compelled.*

A confession, like any other written instrument, should be regarded as taking effect upon delivery. Before that it is like the manuscript of a novel, which the author may destroy. The boy testified that after writing out Ex. "H" in school, he put it in his pocket and forgot about it; he did not show it to anybody else (R. 267). And it is perfectly clear that if he had not been compelled to publish it, he would not have done so.

The definition of confession includes communication. Such is Bouvier's definition:

> "The voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participa-

tion which he had in the same." (Third Revision, 1914)

Here the officers did not have to apply any force because the confession was all written out. But the threat of it was there; Jackson's conduct was such an intimation that the situation was "inherently coercive."

But even in ancient times the mere writing of a confession in privacy, without substantiation by the defendant's subsequent oral admissions, was not enough to convict. Macaulay tells in his essay on Lord Bacon ("Miscellaneous Works," Harper & Bros., New York) how, when Bacon was attorney-general (about 1614), an aged clergyman named Peacham was accused of treason on account of some passages in a sermon which was found in his study. "The sermon, whether written by him or not, had never been preached. It did not appear that he had any intention of preaching it. The most servile lawyers of those most servile times were forced to admit that there were great difficulties both as to the facts and as to the law." The difficulties were removed by putting the prisoner to the torture (an illegal procedure, even then), and by tampering with the judges. But, although Peacham was finally convicted, the charges were "so obviously futile that the government could not, for very shame, carry the sentence into execution; and Peacham was suffered to languish away the short remainder of his life in prison."

The instrument upon which the boy was convicted was never intended for publication, and it is shame-

ful indeed, for the state of Washington to compel him to produce it, and then imprison him for doing so.

II.

The written confession upon which the conviction was based was not in fact or in law a confession.

A. *Considering the age of the defendant, his character and personality, and the circumstances under which the confession was written, it should have been rejected as worthless.*

In the trial of Richard Hein the possibility that the written instrument involved here was false, or was written as a prank was not even explored. It was assumed throughout that the confession must be true.

In the original criminal trial the judge presiding had prepared an instruction upon the hypothesis that the confession was false. The instruction was not given, nor was there anything of similar import. In his own words:

> "That instruction was to the general effect that it was for the jurors to determine, from all the evidence bearing thereon and in the light of all evidence in the case, whether Exhibit 'H' was fact or fiction, truth or falsity. And I assume such was a matter for the determination of the jury, even in the absence of that instruction.
>
> "That instruction was that according as the jury might have determined such to be, they would give the force and effect in the determination of the verdict. If they found it fiction, they might cast it aside of no moment, and proceed to the determination of the guilt or innocence of the accused upon what they might deem other

credible evidence in the cause. Whether the jurors determined that such was fact or fiction, truth or falsity, I suppose we will never know." (R. 323, 324)

The supreme court treated the writing as a confession, for in their opinion they said, speaking of the defendant, "He was arrested, and a full confession, written on school paper, was found in his possession" (32 Wn.2d 316). They were led into this by the prosecuting attorney's brief, which says, "* * * what the officers found there at that time is very accurately written out and verified in appellant's written confession dated September 17, 1947." In the state's brief there is no suggestion that there could be any doubt that it was truly a confession (Ex. "J" in Cause No. 48277).

The only evidence touching the writing of the confession came from the boy himself. When in the jail in obedience to the command of the sheriff he laid his things out on the table, he was taken from the room (R. 272, 285). Upon his return the following occurred:

"By MR. SHERIDAN (prosecuting attorney):

Q. That was in your wallet, wasn't it, Richard (showing him a piece of paper with writing on it)?

A. I don't know. I wrote it in study hall in school one day.

Q. You wrote this out yourself?

A. Most likely.

Q. Most likely, Richard! I'm not going to argue with you but that's your writing and address, isn't it?

A. It probably is.

Q. You wrote it in school on the 17th day of November?

A. Not the seventeenth, I could have dated it back.

Q But you wrote it?

A. Maybe.

Q. You told us a minute ago you did, why change your story right here. Wouldn't you feel better if you got it out of your system now?

A. I didn't kill him so what the hell have I got to worry about.

Q. Richard, you called Joe a liar a minute ago and now we find this in your wallet and you say you wrote it in school?

A. I didn't tell him a damn thing Monday or Tuesday, either one.

Q. When was it you told him?

A. I told him all I read in the paper. * * *." (R. 508)

At his trial the boy testified to exactly the same thing. He refused to identify the particular writing, doubtless because it had been out of his possession from November to April (R. 289), but he had no hesitency in saying that he wrote something like it on Wednesday. (The crime was discovered Tuesday.) He repeated what he said in the sheriff's office that it had no foundation in fact (R. 265). The matters contained in the note he learned in the neighborhood the evening before (R. 259). After he wrote the note he put it in his pocket (R. 264) and forgot all about it (R. 267). Referring to his refusal to identify the writing when he was brought back into the room at

the jail, he said his refusal was based on the fact that he "couldn't recall right away" (R. 272).

He explained why the note bore date November 17th (R. 276); it was merely part of the fiction. On cross-examination he went over the ground again without faltering (R. 284).

In the state habeas corpus proceeding the trial judge said nothing about the inherent credibility of the writing. He said *anything* seized as a result of a lawful arrest could be admitted in evidence (R. 492). The supreme court in the appeal in that case treated the question as though only involving the privilege against self-incrimination (35 Wn.2d 688, 215 P.2d 403).

The district judge held that the writing was properly submitted to the jury and all questions involving it were foreclosured by the verdict; that whether or not it was a confession was immaterial, as in any event it was competent as circumstantial evidence (R. 514).

The writing in question should not have been regarded seriously by the law enforcement officers. Wild and improbable statements from fourteen-year old boys are not uncommon, and experienced officers know almost instantly from their hyperbolic character that they are pure invention. But even though they chose to take it seriously the court should have rejected it. For one thing is certainly required in the case of a confession, and that is that the confessionalist be of serious intent.

"To render confessions of guilt credible, it is

essential that they should have been made with a *sincere intention of telling the truth.*" Wharton, Crim. Ev., 11th ed., p. 956, Sec. 580.

"Consequently such written statement, *when prepared deliberately* and *solemnly*, is admissible in evidence against the defendant who made it, but it is of weight proportioned to its solemnity and pertinency." *Id.*, Sec. 582 (Emphasis added)

The boy at the outset, at the very moment the confession was discovered on his person, said it was not true; he immediately said he did not kill the man (R. 508). This was said directly to the prosecuting attorney. He next said, in his affidavit filed with the motion to suppress that he had not confessed to the murder (R. 569). Upon his trial he was asked by his counsel why he wrote it; his answer was, "Just for foolishness" (R. 264). He was asked if there was any basis in fact for what was written, and answered, "No, it isn't the truth" (R. 265). He was cross-examined but no attempt was made to show that it was anything but what he described it, "foolishness" (R. 285).

The boy was not a witness in the state habeas corpus hearing and was not present (R. 362). After the decision of the supreme court affirming the order of the superior court dismissing the petition, the prisoner submitted to two tests at the request of the "Seattle Times" (R. 69, 81). One of these was a "truth-serum" test, conducted by a physician who is a specialist in anesthetics. This physician practices in the town where the penitentiary is located (R.

48), and he administered the test there (R. 51), on September 10, 1950 (R. 102). Under the influence of this powerful drug, which inhibits the ability to rationalize (R. 49), the boy gave answers showing plainly that he knows nothing about the murder (R. 102-121).

Another test was the Keeler Pylograph, or "lie detector," which was administered by a factory technician (R. 65, 74). The technician was of opinion that the boy was not guilty of the murder (R. 75, 121).

Because a confession is so weighty as proof we must demand the most satisfactory testimony before accepting that, which if believed, will render other evidence superfluous. Wigmore on Evidence (Revised Ed.) Vol. 3, Sec. 866, p. 358.

From before the time of the Amelikite who went into the camp of David and falsely said he had slain Saul, 2 Sam. 1, to the present day, false confessions have been known to the law. Wigmore, "The Science of Judicial Proof" (3rd ed.) Sec. 275, p. 621; Hans Gross, "Criminal Psychology" (Trans. Kallen, 1911) Sec. 8, p. 31; Bentham, "The Rationale of Judicial Evidence," Vol. 3, p. 117, *et seq.;* Wigmore on Evidence (Revised Ed.) Sec. 867, p. 359; Best "The Principles of the Law and Evidence" (Third American Ed. by Charles Chamberlayne, Esq., 1908) Vol. 3, p. 509.

Under the truth-serum test the boy himself gave us the clue to his action in writing this note. "I was a big egotistical lad," he said when under the influence of the drug (R. 111). This is about as good an

explanation as any, for we do not feel competent to examine the main-springs of adolescent conduct. But legal scholars have studied the subject. Best, whose great work is above referred to, based his studies on Bentham, the "father of judicial evidence." In his work he says:

> "The fallacy also of attributing a conclusive effect to confessorial evidence was detected by the intelligence of later times, * * * and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature — self-preservation — may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning, however, is more plausible than sound. Conceding that every man will act as he deems best for his own interest, still (besides the possibility of his misconceiving facts or law), he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give place to the stronger and consequently, that a false confessorial statement may be expected when the party sees a motive sufficient, in his judgment, to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment announced by law against offenses is visible to all mankind, not only are the motives which induce a person to avow delinquency confined to his own breast, but those who hear the confes-

sorial statement often know little or nothing of the confessionalist. * * *

"'Vanity,' observes the jurist above quoted (3 Bentham, Judicial Evidence, 117, 118), without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another * * *.' False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally * * *. And whether from such morbid love of notoriety, or mere weak-mindedness, or a love of mischief, it is almost invariably the case of murders of a specially horrible kind,—as, for instance, the Whitechapel murders of prostitutes in 1888 and 1889—are followed by a series of false confessions * * *."

Consider the situation of a 14-year old boy coming home and finding his neighbor brutally slain. Is it remarkable that the thing preyed on his mind? That he let his mind dwell on the manner of the killing? And then, in fancy, that he composed an account of it, with himself as the principal figure?

"A dramatic, bold crime may captivate imagination and cause admiration and may lead someone to confess falsely for being looked upon by others as the author of the crime." P. C. Bose, "Introduction to Juristic Psychology," (Calcutta, 1917) p. 361.

B. ***The question of whether, considering the foregoing, the instrument was a confession, was for the court, and the verdict of the jury did not foreclose it.***

The question whether a confession may form the basis of a conviction is always one of law for the court. Wigmore on Evidence (Revised Ed.) Sec. 861. As the author explains, the reason is that our confession rules are somewhat artificial and the jury is not familiar enough with them to employ them.

Only where there is a question of fact as to whether a confession was given under force or inducement is the question for the jury. *State v. Van Brunt*, 22 Wn. 2d 103, 154 P.2d 606. The facts concerning this confession were freely admitted, so there was nothing for the jury to pass upon. But the confession being given to them in the manner which it was—without any instruction (R. 323)—how could the jury do other than take it very seriously? With that before them they almost had to convict.

Wigmore, after discussing the history of confessions in the law and the theories under which they are admitted and rejected, sums up his own ideas by the statement that all *well-proved* confessions should be admitted. Wigmore on Evidence (Revised Ed.) Sec. 866, 867. Whether they are "well proved" is naturally for the court. In this case the confession was not well proved; it was not proved at all (by which is meant its intrinsic worth was not established). And in holding that the question was foreclosed by the verdict (R. 514), we submit the district judge erred.

As has been already pointed out, no court has determined that the confession in the case at bar was voluntary. This is almost exactly like the situation

in *Ashcraft v. Tennessee*, 322 U.S. 143, where, after carefully reviewing the state-court proceedings, it was said:

> "If the question of the voluntariness of the two confessions was actually decided at all it was by the jury." (page 146)

After reaching this conclusion, the court said further:

> "This treatment of the confessions by the two State courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of 'independent examinations' of petitioner's claims which, in any event, we are bound to make * * *. Our duty to make that examination could not have been 'foreclosed by the finding of a court, or the verdict of a jury, or both'." (pp. 147, 148)

The district judge did not follow the Supreme Court's pronouncements. He felt bound by the verdict of the jury, both as to voluntariness of the confession and as to its weight. He said:

> "Petitioner contends that the writing was not a confession since it was written in privacy, not directed or communicated to any other person and was wholly an untrue, fabricated statement, written out as the result of a childish whim or prank. It was the theory of the defense that the writing was purely fictional but the jury, as the arbiter of the facts was not obliged to adopt that theory. The date the writing bore and its contents, considered with other evidence in the case, were capable of supporting an inference that prior to the discovery of the body of the murdered man, the defendant Hein had detailed

knowledge of the manner in which the murder was committed. Whether or not the writing may strictly be regarded as a confession, it was material and it did have probative value. The weight to be given it was for the jury to determine." (R. 514)

Like every other fact in a criminal trial, the fact of confession must be proved. Wigmore, Sec. 860, 861. Considering the facts established at the criminal trial, can it be said that this confession was proved? Can it be said there is an inference that the boy confessed, arising merely from the writing of the note? We submit there is no such inference, and that no confession was proved.

Again we refer to the works of a great legal scholar, this time the German to whom Wigmore dedicated his work, "The Science of Judicial Proof." The writer is Hans Gross and the work is "Criminal Psychology." On page 31 *et seq.*, we read:

"The making of a confession, according to laymen, ends the matter, but really, the judge's work begins with it. * * * Confession is a means of proof, and not proof. * * * The existence of a confession contains powerful suggestive influences for judge, witness, expert, for all concerned in the case. * * * Concerning himself, the judge must continually remember that his business is not to fit all testimony to the already furnished confession, allowing the evidence to serve as mere decoration to the latter, but that it is his business to establish his proof by means of other evidence, *independently.* The legislators of contemporary civilization have started with the proper presupposition—that also false confessions are made,

> * * * (and) can be discovered as false only by showing their contradiction with the other evidence. If, however, the judge only fits the evidence, he abandons this means of getting the truth. * * *"

The record in the criminal case shows that the boy could not have committed this crime. The body of the victim was discovered Tuesday (R. 127). The boy was in school all that day and the day before that, Monday (R. 239). His whereabouts were thus accounted for from 8:40 A.M. to 3:15 P.M. those days. His whereabouts on Saturday were shown by his father (R. 213). His mother, petitioner here, was working during the day but she accounted for him that evening (R. 230), as did the father (R. 216).

On Sunday the boy piled wood for a neighbor until noon (R. 217, 231). In the afternoon he was with some other boys (R. 780-788, 917). His mother (R. 233) and father (R. 217) corroborated this. He stayed home Sunday evening (R. 218, 234). Monday morning he went to school (R. 219, 235) and, as previously noted, the school records show that he was present all day.

When he got out of school Monday night he met his father and mother (R. 235). That night his mother went to P. T. A. meeting (R. 235) and he stayed home with his father and ten-year-old brother (R. 220).

No attempt was made to contradict any of this. The witnesses to the boy's alibi were not impeached, and if any doubt is to be cast upon the testimony of appellant and her husband there should be some sug-

gestion in the record as to why they were not to be believed. *United States v. Lee Heun*, 118 Fed. 442. The readiness of the parents to permit a search of the home shows they had nothing to conceal.

The rule in Washington is that only where there is an issue of fact involving the making of a confession is its admissibility for the jury. Where the facts are admitted it is a question of law for the court. *State v. Van Brunt*, 22 Wn.2d 103, 154 P.2d 606. In the case at bar the defendant told why and under what circumstances he wrote the note. It was for the court, then, under the admitted circumstances to determine whether the instrument was to be treated as a confession.

The Washington statute on the admissibility of confessions reads as follows:

> "Confession as Evidence. The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." Rem. Rev. Stat., Sec. 2151.

Under the statute, it is held that the question of duress is for the court; if he finds the confession was made under the influence of fear produced by threats he is to reject it. *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Washing*, 36 Wash. 490, 78 Pac. 1019.

But even if the confession involved a jury question, are they to be left entirely without guidance? Without being given the option to reject it if they find it false?

The Washington constitution requires the judges to declare the law. Art. IV, Sec. 16. And the concept of a fair trial includes instructions upon every element of the case. There should be instructions on all essential questions of law involved in the case, whether requested or not. *Kreiner v. United States* (2 Cir.) 11 F.2d 722, 731, cert. den. 271 U.S. 688; *Kincaid v. United States* (D.C.) 96 F.2d 522; *Kenion v. Gill* (D. C.) 155 F.2d 176; *People v. O'Dell*, 230 N.Y. 481, 130 N.E. 619; *Com. v. Ferko*, 269 Pa. 39, 112 Atl. 38; *Pearson v. State*, 143 Tenn. 385, 226 S.W. 538; *Duroff v. Comm.*, 192 Ky. 31, 232 S.W. 47; *State v. Lackey*, 230 Mo. 707, 132 S.W. 602.

C. *The question of the voluntariness and trustworthiness of the confession cannot be disposed of by allowing it to go to the jury as circumstantial evidence.*

The district judge said in his letter to counsel:

> "Whether or not the writing may strictly be regarded as a confession, it was material and it did have probative value." (R. 514)

This was the view taken by the state court judges, and amounts simply to the assertion that the writing was admissible as circumstantial evidence. The judge presiding at the criminal trial said it had "evidentiary value" (R. 323). It was also the view of the judge in the state habeas corpus hearing (R. 492, 493).

Confessions are not circumstantial evidence; they are direct evidence of the highest character, for the defendant on trial testifies directly against himself

Because they are so weighty as proof, it is necessary to discriminate carefully between the acceptance of the confession as a proved fact, and whether the fact of confession has been proved. Wigmore, Vol. 3, p. 357, Sec. 866. If it has not been proved to be a confession the jury is not entitled to consider it.

Confessions are not circumstantial evidence as that term is used in statutes prohibiting the death penalty where the conviction is based upon circumstantial evidence. Nichols, Applied Evidence, Vol. 2, p. 1069; *Mitchell v. People*, 76 Colo. 346, 232 Pac. 685, 40 A. L.R. 566.

The boy testified that he wrote this note in school on Wednesday (R. 264). When first confronted with it he said he could have dated it back (R. 508). At his trial he testified that he dated it back because the newspaper account that came out first said the deceased had been dead from 18 to 24 hours, so he dated it back to Monday, the 17th (R. 276). The record shows that he read the Seattle paper on Wednesday (R. 293); and the account, dated Tuesday, did say that the victim had been dead from 18 to 24 hours:

> "Everett, Nov. 18 (AP)—Brutally bludgeoned about the face and with his throat cut, the body of James Moore, 85, was found today in the front room of his large, three-story house in Hartford by a neighbor, Snohomish County Coroner, Kenneth Baker reported. *He had been dead 18 to 24 hours.* * * *" (Excerpt from Seattle "Post-Intelligencer," of Wednesday, November 18, 1947, quoted in Appellant's Brief in *Hein v. Smith*, Washington Supreme Court, No. 31139)

Against this we have nothing—except suspicion.

There was not even a circumstance indicating that the defendant, overburdened with the sense of guilt, found that he must give expression to it, and wrote the confession. If such an overpowering desire to share his guilty secret existed, would it not have manifested itself at some time, particularly when, upon his arrest, he was charged with this murder? When we consider that he, an immature boy, should have convinced experienced law enforcement officers of his innocence—note that Webb Sloane, with 14 years on the Washington State Patrol (R. 63), directed questions to him (R. 119 *et seq.*) and testified that he was satisfied with his answers while under the truth-serum (R. 64)—has withstood confinement since November 18, 1947 (R. 38); has asked for a new trial (See Cause No. 31175, Washington Supreme Court), when he knew that the next jury could hang him; has at all times maintained his innocence;—when we contemplate these and other matters in the record here, can we say that he is harboring a guilty secret? No, such a secret would have devoured him before this. Cf. Daniel Webster in *Com. v. Knapp*, VII American State Trials 395.

Parenthetically, it may be noted that the defendant did not waive his immunity under the Washington constitution against compulsory self-incrimination by taking the stand. He had been placed under the imputation of guilt and his explanation of the confession was not a waiver. *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477; *State v. Jackson*, 83 Wash. 514, 145 Pac. 470.

If a confession—inadmissible because it is not voluntary or trustworthy—could be admitted, not as a confession, not as proof of the facts therein contained, but simply as another circumstance to be considered along with the other evidence tending to establish guilt, then the result of the confession cases in the Supreme Court would have been quite different. For it must be conceded that the fact that a man is willing to confess, even under pressure, is some evidence of guilt, particularly to the lay mind. And if the prisoner's arm is twisted only a little, is that not evidence that the admission was ready to his lips? Should not the jury be allowed to consider that an innocent man would have held out longer?

These speculations have no place in a system that conforms to "civilized standards." *Chambers v. Florida*, 309 U.S. 227. The Supreme Court has in several cases been asked to consider that but little force was used; they have always refused to measure the coercion. In *Malinski v. New York*, 324 U.S. 401, the defendant was not tortured; he was humiliated, was made to sit in a corner naked; "psychology" was used upon him; but there was hardly enough to break the will of a strong man. And there was substantial, independent evidence of guilt. The court held the admission of the confession fatally tainted the verdict, and directed a reversal. So in the case at bar, the instrument should not have been permitted to have any part in the jury's deliberations, neither as a confession, for it was not that, nor as circumstantial evidence.

D. ***There was no corroboration of the confession.***

It is impossible to find any corroboration of the confession in the record. The defendant's accounts of his activities is not disputed, and nothing before or after the discovery of the crime lends color to the theory that he had knowledge different from anybody else. All the facts stated in the writing were known to the public the day the body was discovered. Mere curiosity seekers had entered the house when the body was found (R. 899).

The possession of money is a circumstance, but it stands alone. In cases where the possession of money figures in a conviction it will always be found to be associated with other strong circumstances pointing to guilt.

The possession of the money was explained (R. 246, 250, 268, 278, 287). In the truth-serum test the boy was asked about it again (R.. 105, 108, 119). It is true Oscar Magnuson denied giving him the money (R. 295), but he had good reasons for doing so.

Robbery was relied upon to furnish motive, and it was sought to show that the accused had seen the deceased with money the day he was last seen alive (R. 837). But the witness later explained that the defendant was in another part of the store, back of a partition telephoning, and could not have seen the deceased (R. 1191).

Corroboration should, of course, go to the crime, not the confession. For the latter is admitted; what is needed is evidence to identify the slayer as well as the slain. *State v. Gregory*, 25 Wn.2d 773, 171 P.2d

1021. In Washington there must be some *independent* evidence identifying the defendant as the killer.

> "No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts beyond a reasonable doubt." Rem. Rev. Stat. Sec. 2391.

And a conviction in Washington cannot be based upon an uncorroborated confession alone. *State v. Marselle*, 43 Wash. 273, 86 Pac. 586; *State v. Bestolas*, 155 Wash. 212, 283 Pac. 687.

The true test of a confession is whether it is trustworthy. *State v. Susan*, 152 Wash. 365, 273 Pac. 149; *United States v. Klee*, 50 F.Supp. 679 (D.C. Wash., per Schwellenbach, J.); *People v. Valletutti*, 78 N.E.2d 485 (N.Y.); Wigmore on Evidence (Rev. Ed.) Vol. 3, p. 246, Sec. 822. If this document were a trustworthy confession it would find some corroboration in the evidence. There is none.

E. *Perjured evidence was knowingly used in an attempt to corroborate the confession.*

After Joe Jensen told his story to the sheriff's deputies and prosecuting attorney, he was allowed to go his way. We have already seen how doubtful this story was, since he told the prosecutor that he could be mistaken about the day of the conversation (R. 508). No effort was made to determine exactly when the conversation occurred (R. 467-469). Jensen was allowed to go his way; no subpoena was served upon him; he was not told that he must hold himself in readiness to testify (R. 381-382). He went to California.

He was visiting an uncle in Chico when he got a telegram from his father that he was wanted as a witness (R. 382). He did not get the chance to come back voluntarily because he was arrested immediately and lodged in jail. The deputy, Weaver, came down and returned him to Everett under guard. There he was thrown in jail and held until the trial was over (R. 387, 1384).

While he was in jail he was given a statement and was told he had to testify according to that (R. 390). The testimony he gave was false because he left the impression that the conversation between Richard and himself occurred before the discovery of the crime; whereas, in truth, it occurred on Thursday, two days after such discovery (R. 448).

The judge in the state habeas corpus proceeding chose to disbelieve Jensen's testimony at that hearing, and the supreme court and now the district judge agrees with him.

There was no motive for perjury at the second hearing. The witness was under no pressure. He understood the risk he was running of being charged with perjury when he changed his testimony (R. 422). He said he wanted to do what was right (R. 442), and that was the only motive for taking the stand in that case.

Jensen was weak and indefinite. It is apparent that he wanted to please the officers (R. 184). And it is very clear that they knew he was stretching the truth considerably in giving his testimony. The testimony given in the state habeas corpus hearing confirms this.

But even without the subsequent recantation there would be sufficient circumstantial evidence of the knowing use of perjury.

> "In a case of this nature one would not expect to find direct proof of the connivance of the prosecution in the use of perjured testimony, and the circumstantial evidence is as strong as could reasonably be expected." *United States v. Ragen*, 86 F.Supp. 382, 390.

III.

The complaint here is not for mere errors but of a wrong so fundamental as to render the proceedings void as contrary to due process of law.

After a trial in a state court the petitioner may have a hearing in a court of the United States into the very substance of the proceedings leading to his conviction, if it appears that rights secured by the Constitution have been violated. This may involve a consideration of the evidence for, as Mr. Chief Justice Hughes observed:

> "The freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal." *Brown v. Mississippi*, 297 U.S. 278.

So the position taken by the state, that this is just another piece of evidence, and the sufficiency of the evidence to sustain a conviction cannot be inquired into upon a habeas corpus, is not sound. For the admission of incompetent evidence may involve a vio-

lation of due process. It has been held that a conviction based upon hearsay alone renders a conviction void. *McRea v. State*, 8 Okl. Crim. 483, 129 Pac. 71; *Smith v. State*, 59 Okl. Crim. 312, 58 P.2d 347; *Young v. State*, 208 P.2d 1141.

Some years ago the editors of the Lawyers Edition of the Supreme Court reports gave their views in this language:

> "Although no case has been found in which an irregularity connected with matters of evidence or witnesses has been considered grave enough to justify the issuance of habeas corpus, it cannot be said that such an irregularity will under no circumstances be a sufficient basis for a habeas corpus. Where the irregularity committed constitutes such a drastic violation of the constitutional rights of the prisoner as to deprive him of the fundamentals of a fair trial, the United States Supreme Court may feel moved to grant the writ, since the Supreme Court has always felt it to be its privilege 'to look beyond forms, and inquire into the very substance of the matter.' *Frank v. Mangum*, 237 U.S. 309, 331, 59 L. ed. 969, 981, 982, 35 S. Ct. 582." Note to *Pyle v. Kansas*, 87 L. Ed. 220.

The principle expressed by Mr. Chief Justice Hughes in *Brown v. Mississippi*, 297 U.S. 278, is certainly applicable here:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." (p. 286)

It has been argued that the failure to urge some of

the matters argued herein is fatal to petitioner's case here. But where constitutional rights are involved an entire failure to pursue appellate remedies would not bar a federal court from granting relief in a proper case.

> "Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case. *Smith v. O'Grady*, 312 U.S. 329." *Williams v. Kaiser*, 323 U.S. 471.

The district judge recognized the principle involved here, for he said:

> "In considering the petition and the evidence here, I have had in mind the principle applied in the leading case of *Powell v. Alabama*, 287 U.S. 45, and followed by the Supreme Court in many later cases, namely, that even though the first eight amendments do not apply directly to the states, nevertheless, if in the overall setting of a state court trial the denial of a right guaranteed by such amendments had the effect of depriving the accused of a fundamentally fair trial, then the accused has not been accorded the due process required of the states by the Fourteenth Amendment. In other words, a state court conviction may be successfully attacked by petition for habeas corpus if the trial is tainted with error so serious as to constitute 'a denial of fundamental fairness, shocking to the universal sense of justice. * * *.' *Betts v. Brady*, 316 U.S. 455, 462."

In applying the principle, however, he ignored too many things. He seems to assume there is some tangible, real evidence to convict. There is none. Reading the record, one can see there was no real effort to

get at the facts, that the investigation was superficial. Thus, the sheriff's office made no investigation after the note was discovered (R. 1386), and the prosecutor made none either (R. 1262). The testimony of the child-witnesses was relied upon entirely to substantiate the confession. Instead of complying with conduct required of the states and laid down by the Court in *Watts v. Indiana*, 338 U.S. 49, that it

> "must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation,"

the state contrived a conviction by turning an innocent and random scrawl into a solemn confession of guilt.

Can it be said that the testimony of the deputy sheriff, Walker, was compatible with fundamental fairness? That it was fair for the prosecutor to use his own secretary to get his bias against the prisoner across to the jury? For him to ask John Hein whether he was not expecting his son (for son in fact he was) sometime to be charged with murder? And was it fair for him to represent to the supreme court in his brief that no reasonable doubt existed that the boy had guilty knowledge, when in fact there was very troubling doubt on this score?

Perhaps there should be no difference in the trial of a hardened criminal and a little boy. But the Supreme Court has noted a difference. *Haley v. Ohio*, 332 U.S. 596; *Uveges v. Pennsylvania*, 335 U.S. 437; *Wade v. Mayo*, 324 U.S. 672.

A. *The admission of testimony of a police officer as to answers by the accused to questions put by the officer which tend to prove guilt violates rights secured by the Fourteenth Amendment.*

In the *Bram v. United States*, 168 U.S. 532 case, the Court gave the reasons for not permitting testimony of police officers of the statements of the accused under questioning while in their custody. Aside from the historical reasons, which are in themselves weighty, the temptations toward abuse are too great. They said:

> "While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which questions put to him may assume an inquisitorial character, the temptation to press him unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, * * * made the system so odious as to give rise to a demand for its total abolition * * *." (168 U.S. 532)

And when a police officer is permitted to give testimony of statements made by an accused from which guilt may be inferred, the abuses are carried into the courtroom, and the accused finds himself powerless to meet them. Consider the testimony of Walker, the deputy sheriff, who knew nothing of the investigation when he came on duty the night the boy was arrested. Surprised to find a child in his custody, he asked him what he was there for.

"A. I asked him what he was doing in the tank.

Q. What did he say?

A. He said he was — —

MR. DAILEY (Interposing): Now, just a moment, Your Honor, this is something that seems to me is too remote to have anything to do with the issues here.

THE COURT: Well, I think some more specific question might be asked here, sir.

Q. Did you make inquiry of him at that time as to why he was there?

A. I did. I asked him what he was doing up there.

Q. Did you ask him why he was in jail?

A. I did.

Q. What did he say?

MR. DAILEY: I object to that, if Your Honor please. I think it is too remote.

THE COURT: It will be overruled.

MR. DAILEY: Except.

A. He said he was in for murder.

* * * * * * * * * *

A. I asked him if he murdered this man.

Q. What was his response to that?

A. The answer was—he kind of shook his head, and said, what sounded to me like 'uh-huh,,' 'but,' he said, 'they'll have to prove it on me." (R. 772, 773)

(The matter of unfounded inferences drawn from words supposed to be confessorial is discussed in Best, "Principles of the Law and Evidence," opr. cit., p. 522-523.)

Compare the foregoing quotation with the *Bram* case. Following is what the officer was permitted to testify to in the *Bram* case, and which the Supreme Court held violated his rights under the 5th Amendment: The detective told the accused, while he held him prisoner, that another member of the crew saw him do the murder. The accused answered, "He could not have seen me; where was he?" When he was told the witness was at the wheel, he said, "He could not have seen me from there" (168 U.S. 538). These statements were offered in the government's case in chief. Apparently to avoid the rule requiring a showing that confessions, to be admissible, must be voluntary, the government contended they were not confessions because they were denials. But the court said:

> "It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this is the only conceivable hypothesis upon which it could legally be admitted to jury." (168 U.S. 541)

B. ***Testimony by the prosecutor's paid employee that denials of guilt by a boy in custody for murder seemed to her not emphatic and left her with a feeling of doubt as to whether he was telling the truth is in violation of the right of the accused to a fair trial.***

Phylli Mootz, the prosecutor's secretary, who had worked for former prosecutors (R. 803), testified to events at the jail interview. When counsel for the defendant asked her to admit that the boy denied committing the murder (a witness for the state had testified that he denied it, R. 167), the temptation to

color the facts against the boy was too great to resist. Some of the questions and answers follow:

"Q. During all of that time Richard denied that he had anything to do with Mr. Moore, didn't he?

A. What do you mean—with him?

Q. With this killing.

A. Yes, he denied it at first; but he admitted writing this statement.

Q. He admitted writing that statement? Now, I didn't ask you anything about that. He denied throughout their conversation, and throughout all of the questioning they gave him there, that he killed Mr. Moore?

A. Yes, but he wasn't emphatic about it.

Q. He wasn't emphatic about it? What do you mean, he wasn't emphatic?

A. He just said, 'I didn't do it.'

Q. That's all he said. He just said, 'I didn't do it," is that right?

A. Yes. He kept denying it.

Q. He kept denying it, and denied it constantly, isn't that right?

A. Well, he wasn't asked constantly. He just was asked to state what had happened.

Q. Well, of course, he was asked a good many questions there, wasn't he?

A. That's right.

Q. And it covered a good many pages when you transcribed it, didn't it?

A. Yes.

Q. So he was asked over and over again, wasn't he, Miss Mootz?

A. Yes.

Q. And he denied it each time?

A. Yes.

Q. Now, what do you mean when you say 'he didn't deny it emphatically'? You mean he didn't swear, or rave, about it, or what?

A. That's right.

Q. You mean he sat there quietly and denied it? Is that what you mean?

A. Yes.

Q. He didn't rant and rave about it?

A. That's right.

Q. Would he have to rant and rave around about it to convince you that he was emphatic in his denial.

A. No.

MR. SHERIDAN: Object as being argumentative.

THE COURT: It is.

Q. He was as emphatic in his answers as you have been here, wasn't he?

A. Well, there's sort of hesitation.

Q. Sort of hesitation?

A. Yes.

Q. And that sort of hesitation would come where? When did he sort of hesitate?

A. Well, I would say he just wasn't definite.

Q. What?

A. He just wasn't definite enough in his answers.

Q. He was definite enough in his denial that he had anything to do with it, wasn't he?

A. Yes.

Q. You think he was not definite enough in some other questions that were asked?

A. Well, just the way he answered would leave a doubt in my mind, and it might in some other person's mind, whether he was telling the truth or not.

Q. And you had some doubt?

A. That's right.

Q. And now you have some prejudice, then, in this case, don't you?

A. I'm not prejudiced. I just have doubt." (R. 196-199)

Now it may be argued that this occurred on cross-examination; that counsel did not need to press the witness, and that if he had not done so he would not have elicited this testimony. But what was she there for? She was a state witness, and in addition she was the prosecutor's paid employee. Her job was to influence the jury into a verdict of guilty. The prosecutor could not, himself, express an opinion of guilt, but by putting his secretary on the stand to identify the confession he accomplished much more: he got his own bias against the prisoner across to the jury.

C. ***It is unfair to insinuate before the jury that the boy must be guilty by asking his father on cross-examination if he did not expect some time to find the boy charged with murder.***

This boy was large for his age, fourteen (R. 1254), and this fact was played upon. In his opening statement the prosecutor referred to the size of the boy and told the jury he had endeavored to escape (R. 137). The evidence on this was the other way; the matron in the juvenile detention home testified the boy's conduct was good (R. 822).

But something had to be done to make a killer out of him, so on the examination of Mr. Hein, who was so close to the boy that he hated to admit that he was his stepfather (R. 854, 874), the following questions were asked:

"Q. Then were you present when the sheriff and Miss Mootz and myself informed you of his detention in the Snohomish County Jail?

A. I was.

Q. Do you know what you responded to that? Do you know what your response was to that?

A. I said, 'That's impossible.'

Q. Can you recall whether or not you said, 'I figured this would come'?

A. No, I never said that.

Q. You never said that?

A. No sir. I did not.

* * * * * * *

Q. Are you Richard's father or stepfather?

A. I'm not answering that question.

THE COURT: Yes, you are—and forthwith.

MR. DAILEY: Answer the question.

THE COURT: You are a witness now.

A. I am his stepfather.

Q. Don't you recall at that time, Mr. Hein, asking me, if I had to file charges, if I would file them under another name?

* * * * * * *

A. No, I don't remember that.

* * *." (R. 873-875)

The object of this questioning was to prejudice the defendant before the jury. The inference which the jury was expected to draw—and which they did draw

—was that the parent expected the boy to get into serious trouble; the parent was ashamed of his conduct, and did not want his name connected with his own. This is not the conduct of a "minister of justice." *People v. Klor*, 84 Cal. App. 308, 190 P.2d 643. See also *O'Neill v. State*, 189 Wis. 259, 207 N.W. 280.

IV.

The district court had jurisdiction to hear this case, and this appeal is properly presented.

It is fundamental that rights secured by the Constitution may be vindicated in the federal courts. The only condition is that remedies in the state court first be exhausted, for these courts are under an equal duty to enforce the supreme law. But by exhausting his state remedies a petitioner does not foreclose himself of a hearing in the federal court. If this were so, the compliance with a requirement of Congress, precedent to an application for relief, would bar the applicant from the very relief claimed.

Such is not the rule; but, of course, the court may take into account the prior hearings, and the consideration given to the constitutional claim. The state court here has heard the petitioner and has refused to grant her relief, but neither the state court nor the court below gave consideration to the principal points in issue, which are the compulsory production of the confession, and its intrinsic worth as proof of crime.

In *Frank v. Mangum*, 237 U.S. 309, 331, it was said:

> "* * * a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction

> may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state to proceed against him."

In order to pursue the remedy of habeas corpus in the federal courts it is necessary to exhaust all state remedies, including application for certiorari to the Supreme Court. *Darr v. Burford*, 339 U.S. 200. But it has never been held, and it cannot in the nature of things be the law, that by the very act of exhausting his remedies, the petitioner is bound, with respect to his claimed constitutional right, by the determination of the state court.

There was never any specific finding by the state court that the confession was voluntary. Of course, such finding would not foreclose inquiry by this court. *Lisbena v. California*, 314 U.S. 219; *Lyons v. Iklahoma*, 322 U.S. 596. But the only finding is that the defendant was under arrest when the confession was taken from him, and the voluntariness of the disclosure was not even considered. Nor was the trustworthiness of the writing ever discussed.

A case in the Sixth Circuit, *McCrea v. Jackson*, 148 F.2d 193, is somewhat similar to this. There, after denial of certiorari by the Supreme Court, a petition for habeas corpus was filed in the district court. That court denied the writ upon these grounds: (1) It would be presumptuous to grant the writ after the Supreme Court had ruled; (2) "practically" all

the questions involved had been passed upon by the state supreme court; and (3) it was not one of those "exceptional cases of peculiar urgency" within the rule of *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, which the district court thought it necessary to find. These reasons were held by the circuit court to be insufficient to deny the writ.

The statement as to "those rare cases where exceptional circumstances of peculiar urgency are shown to exist" in the *Kennedy* case was made in a case where the petitioner had not exhausted his state remedies; and was held inapplicable to a case "in which the petitioner had exhausted his state remedies, and in which he makes a substantial showing of the denial of a federal right." *Ex parte Hawk*, 321 U.S. 114, 117.

Of course, the district court had the right to take prior petitions into account in determining whether to entertain petitioner's claims. *Salinger v. Loisel*, 265 U.S. 224. But a liberal view is enjoined upon the court. Even though it might be thought that an abuse was being practiced, the court is required to take a thoughtful and careful view of the petition, lest liberty be lost through deference to rule. *Price v. Johnston*, 334 U.S. 266.

This court has laid down the rule for the district courts. *Forthoffer v. Swope*, 103 F.2d 707. There, following the rule of *Johnson v. Zerbst*, 304 U.S. 458, it was expressed in the syllabus as follows:

> "A judge to whom a petition for habeas corpus is addressed should be alert to examine the facts

for himself when, if true as alleged, they make the trial absolutely void."

The decision of the district judge pays great respect to the determinations of the state court judges (R. 516). This respect is not misplaced; the error lies in making the same assumption they made—that one who confesses must necessarily be guilty. Further, that property taken from one on arrest is per se admissible—even if it is a confession. Starting with these, the result of a trial is a foregone conclusion. And so is the outcome of a habeas corpus case.

A. *The state court did not determine petitioner's important constitutional questions.*

The superior court had before it a petition alleging that upon his arrest the defendant was searched and a writing was taken from him; that this writing was his own property, peculiarly personal, and was not intended for the eyes of other persons; that it was seized during an exploratory search; and that prior to the trial he had made demand for its return.

The state court considered these allegations as bearing upon the lawfulness of the search; and assumed that if the search was lawful anything found could be used to convict, whether otherwise admissible or not. They thus evaded one of the real constitutional questions, which is, can a *confession* taken by force, be used? It cannot, and in the federal courts it would be ordered returned even before indictment. *In re Fried* (2 Cir.) 161 F.(2d) 453.

The trial judge in the state habeas corpus proceeding held that no constitutional right of the accused

was violated during the search, and that the confession thus seized could be used in evidence (R. 493). This, he said, was because the arrest was lawful, and *anything* taken during a search following a lawful arrest could be used (R. 492). In doing so, he followed the rulings of the judge who presided at the criminal trial, who ruled that anything seized, a gun, stolen property, or anything else found could be availed of (R. 205).

The supreme court did not decide whether, considering the manner in which the confession was secured, it was admissible for any purpose. This question is not determined by confusing it with the privilege against self-incrimination.

So also, the supreme court did not decide whether, considering the way in which the confession came to be *written*, it could be treated as a confession. The decision of the supreme court upon the criminal appeal treated it as a confession and in the habeas corpus case the court refused to consider petitioner's arguments that it was not.

So here, resort to the state court "has failed to afford a full and fair adjudication of the federal questions raised," and petitioner properly presents her claims to the federal court.

B. *The state court erroneously decided important constitutional questions.*

That a conviction cannot rest on perjury, particularly when contrived by state officers, is established in the conscience of judges and the decisions of our

highest court. *Mooney v. Holohan,* 294 U.S. 103; *Pyle v. Kansas,* 317 U.S. 213; *White v. Reagen,* 324 U.S. 760; *Price v. Johnston,* 334 U.S. 266. Here the witness Jensen testified directly that he perjured himself when he said that Richard told him about the murder on Tuesday; and that he did so under threats from the sheriff's deputies (R. 391, 400) and pressure from the sheriff himself (R. 400). More important, the prosecutor knew it, or, at least, had information sufficient to cast doubt on the verity of this testimony (R. 508). The state court judge chose to treat the testimony of Jensen in the habeas corpus hearing as false (R. 495) and the supreme court held he was correct. *Hein v. Smith,* 35 Wn.2d 688, 215 P.2d 403.

C. *The denial of certiorari by the Supreme Court is not an adjudication of the merits of petitioners' claim.*

As the district judge said here, the jurisdiction of the Supreme Court is "selective" (R. 523). From the time review in the Supreme Court of judgments of state courts was changed from writ of error to writ of certiorari in 1916 (act of Sept. 6, 1916, 39 Stat. §726, ch. 448, and act of Feb. 13, 1935, 43 Stat. §936, ch. 229) the denial of certiorari has not imported any opinion on the merits of the case. Review as a matter of right disappeared, and the court was enabled to select the cases, which for one reason or another, it wanted to review.

At the present time only about one-sixth of the cases presented are reviewed on the merits. *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917, 918. And because of the pressure of work and other reasons, it

is not possible for the court to give reasons for its denial of certiorari. *Id.*

The court, in *Darr v. Burford*, 339 U.S. 200, reaffirmed the requirement of an application to the Supreme Court for certiorari, but took pains to point out that denial of review imported no opinion on the merits. Wise administrative policy requires that the application be made, but there is no duty upon the court to hear it. And while the district court may take the application and its denial into account in exercising its proper discretion in passing upon the subsequent petition for habeas corpus, when it finds as here that it appears to have merit, and gives more than three months to the consideration to petitioner's claims, then the case is properly before the court. When it then issues its Certificate of Probable Cause the jurisdiction of this court is complete.

There could be many reasons why the Supreme Court was impelled to deny certiorari. A number of the reasons mentioned by Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, might have moved them. The case seemed complicated, and the district judge's analysis might have been thought desirable. It was presented in forma pauperis which made the analysis more difficult. The prisoner had not appeared before the state tribunal in the habeas corpus proceeding (R. 362). The Petition for Certiorari was probably too long. Wiener, "Effective Appellate Advocacy," p. 240, and it may have been deemed necessary to have his testimony before the court.

But when all is said, it is the enormous pressure of business that determines whether a particular case is to be selected for review. Students of the court have pointed out the disgraceful situation that results from an over-crowded calendar. See "Melville Weston Fuller," by Willard L. King (New York, 1950) p. 148.

CONCLUSION

Those of us who study criminal trials often notice how slight the evidence is to convict. But always there is something, some tangible, definite evidence leading irresistibly to the defendant, and which cannot be eliminated or explained away. But here there is nothing, simply nothing at all, because everything is entirely consistent with the hypotheses of innocence.

When we consider this, and the deliberate disregard of rudimentiary standards of fairness, we can reach only one conclusion, and that is that Richard Hein is entitled to his freedom. Such should be the determination of this court. *Widner v. Johnson*, 136 F.2d 416.

Respectfully submitted,

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